Supreme Court U.S.
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IN THE

Supreme Court of the United States

LOCAL UNION NO. 272 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

v.

PENNSYLVANIA POWER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Should the Court deny the Petition for a Writ of Certiorari when the Court of Appeals, following well-established precedent of the Court about which there is no split among the courts of appeal, refused to enforce a labor arbitration award because the award failed to draw its essence from the applicable collective bargaining agreement?

CORPORATE DISCLOSURE STATEMENT

Respondent, Pennsylvania Power Company ("Penn Power") is a wholly-owned subsidiary of Ohio Edison Company, which in turn is a wholly-owned subsidiary of FirstEnergy Corp.

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Rule:

U.S. Sup. Ct. R. 10 1

COUNTER-STATEMENT OF THE CASE

Penn Power incorporates by reference the statement of facts set forth by the Court of Appeals in its opinion, which is reproduced in Appendix C at pages 7a through 10a of the Petition for Writ of Certiorari filed by Petitioner, Local Union 272, International Brotherhood of Electrical Workers, AFL-CIO ("Local 272").

REASONS FOR DENYING THE WRIT

In its Petition, Local 272 sets forth three reasons why this Court should grant the requested Writ of Certiorari. Local 272 first states that there is a conflict among the courts of appeal about the application of the governing principles for review of labor arbitration awards set forth by this Court over forty years ago. Local 272 next argues that the decision of the Court of Appeals presents an important issue of "federal labor arbitration law" which must be addressed by the Court. Pet. at p. 12. Finally, Local 272 asserts that this Court should issue the requested writ because the decision of the Court of Appeals is erroneous.

Penn Power submits that none of the reasons set forth by Local 272 is the type of "compelling reasons" which this Court requires for the granting of a writ of certiorari. Sup. Ct. R. 10.

I. There Is No Conflict Among The Courts Of Appeal Regarding The Application Of The Court's Governing Principles For Review Of A Labor Arbitration Award.

In its Petition, Local 272 argues that the Courts of Appeal for the Third, Sixth and Seventh Circuits have departed from this Court's governing principles, while the Courts of Appeal for the First, Fifth, Eighth and Ninth Circuits have "loyally complied" with the Court's mandate. Pet. at p. 6.[1] As Penn Power will show below, there is no conflict whatsoever among the courts of appeal on the basis stated by Local 272. Rather, Penn Power submits that all of the courts of appeal have merely applied the "essence" test first set forth by this Court in *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), and restated as recently as the Court's decision last term in *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504 (2001).

As Local 272 notes in its Petition, the Court of Appeals ordered that the labor arbitration award be vacated because the court found that "the arbitrator's decision conflicts with the express provisions of the Agreement between the Company and the Union." Pet. App. at 18a. However, Local 272 failed to note that the Court of Appeals also stated that:

> The arbitrator has written into the contract a provision obligating the Company to pay its Union employees voluntary retirement benefits to which indisputably it never agreed and as to which

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1. Local 272 also states in its Petition that the decision of the Court of Appeals conflicts with decisions of this Court. Pet. at p. 7. However, Local 272's Petition limits itself to a discussion of an alleged conflict among the various courts of appeal.

> the Union employees concededly were not entitled. . . . The arbitrator has exceeded the scope of the arbitration provision and his decision fails to draw its essence from that Agreement.

Pet. App. at 18a.

As the foregoing makes clear, the Court of Appeals vacated the decision of the district court and refused to enforce the labor arbitration award because the court concluded that the award failed to meet the "essence" test set forth in *Enterprise*. In its opinion, the Court of Appeals stated the essence test as follows:

> Thus, an arbitration award ordinarily will not be vacated unless its essence is not drawn from the collective bargaining agreement. *W.R. Grace & Co.*, 461 U.S. at 764. To put it differently, if the arbitrator's interpretation is in any rational way derived from the collective bargaining agreement, the arbitration award will not be disturbed. *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969). An arbitration award will not be vacated just because the court believes its interpretation of the agreement is better than that of the arbitrator. *W.R. Grace & Co.*, 461 U.S. at 764. It will be vacated, however, if there is a "manifest disregard" of the agreement. *Ludwig Honold Mfg. Co.*, 405 F.2d at 1128.
>
> In *United Paperworkers International Union*, the Supreme Court made clear that an "arbitrator may not ignore the plain language of the contract." 484 U.S. at 38. Accordingly, this Court has held

> that "where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop" a reviewing court can vacate the award. *Exxon Shipping Co.*, 73 F.3d at 1295; *see also Ludwig Honold Mfg. Co.*, 405 F.2d at 1128 (noting limited review but stating that arbitrator's interpretation must still be derived from agreement). In other words, an award may be set aside when an arbitrator manifested a disregard of his authorization, and instead "dispensed his own brand of industrial justice." *Newark Morning Ledger Co.*, 797 F.2d at 165 (quoting *United Steelworkers of Am.*, 363 U.S. at 597).

Pet. App. at 12a-13a.

It is Local 272's belief that the Court of Appeals, as well as the Courts of Appeal for the Sixth and Seventh Circuits, have "merely paid lip service" to the standards of the Court, while "creating their own inconsistent standard." Pet. at 7.

As noted above, the Court of Appeals applied the Court's essence test as far back as 1969. In *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d at 1126, Judge Aldisert, writing for the court, noted that while *Enterprise* "elevated the arbitrator to an exalted status," the Court also "held a checkrein on him — confining his zone of action to the four corners of the collective bargaining agreement." After stating that the reviewing courts "have not exuded uniformity in translating the 'essence' test into a pronouncement of the appropriate extent or limitation of judicial review of the arbitrator's interpretation," the Court of Appeals in *Ludwig Honold* set forth the standard quoted above.

Penn Power therefore asserts that contrary to the contrived notion that the court has merely paid "lip service" to *Enterprise* and its progeny and created its own standard, the standard used by the Court of Appeals is nearly as old as *Enterprise* itself. Viewed this way, the standard of the Court of Appeals of a "manifest disregard" is completely *consistent* with the Court's reiteration of the *Enterprise* principle in *United Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987), where the Court also cautioned that "the arbitrator may not ignore the plain language of the contract." Thus, as the Court of Appeals stated in *Ludwig Honold*, there is still a "checkrein" for a labor arbitrator, whether expressed as the caution of the Court of Appeals about a "manifest disregard" of the agreement, or the admonition of this Court about ignoring the "plain language" of the contract.

Local 272's argument that the Sixth and Seventh Circuits also have not "loyally complied" with the Court's standards is equally contrived. In *Appalachian Regional Healthcare, Inc. v. Steelworkers*, 245 F.3d 601 (6th Cir. 2001), *cert. denied* __ U.S. __, 122 S. Ct. 350 (2001), and *Anheuser-Busch, Inc. v. Local Union No. 744*, 280 F.3d 1133 (7th Cir. 2002), each court applied the essence test. The Sixth Circuit, for instance, stated that it has vacated awards in four types of cases, one of which is where the award "conflicts with express terms of the collective bargaining agreement," citing its own case from twenty years ago. *Appalachian*, 245 F.3d at 604. The Seventh Circuit stated its inquiry under the essence test as "not whether the arbitrator misinterpreted the agreement, but only whether the arbitrator's inquiry disregarded the very language of the agreement itself." *Anheuser-Busch*, 280 F.3d at 1137. Penn Power submits that these judicial statements, like that of the Court of Appeals, are merely indications of an observation by the Court of Appeals over 30 years ago in

Ludwig Honold, which is that the courts of appeal have translated the essence test in different ways. All three courts, however, have adhered to the essence test itself, and particularly to the subsequent statement by this Court in *Misco* that an arbitrator "may not ignore the plain language of the contract." 484 U.S. at 38.

The contrived nature of Local 272's assertion that three courts of appeal have paid "lip service" to the Court's standards is made even more evident when the decisions of the four courts of appeal said to have followed the Court are reviewed. Local 272 refers to *Boston Medical Center v. Service Employees International Union, Local 285*, 260 F.3d 16 (1st Cir. 2001), a recent decision of the First Circuit, where a mere footnote reference to *Misco* is cited as faithful adherence to the essence test. 260 F.3d at 21 n.4. Local 272 also refers to a Fifth Circuit decision, *Weber Aircraft, Inc. v. General Warehousemen and Helpers Union Local 767*, 253 F.3d 821 (5th Cir. 2001), and then quotes *dicta*, also citing *Misco*, as another example of a court which "followed this Court's pronouncements." Pet. at p. 11. Local 272 does not highlight any aspect of the decisions of two other courts mentioned in its Petition, which are those of the Eighth Circuit in *Brotherhood of Maintenance of Way Employees v. Soo Line Railroad Company*, 266 F.3d 907 (8th Cir. 2001), and the Ninth Circuit in *Southern California Gas Company v. Utility Workers Union of America, Locāl 132*, 265 F.3d 787 (9th Cir. 2001). Penn Power notes, however, that the Ninth Circuit stated that: "Only where the arbitrator ignores the contract's plain language, choosing to dispense his own brand of industrial justice, may we question his judgment," a statement which is completely consistent with that of the Court of Appeals. 265 F.3d at 792.

Penn Power submits that the only "conflict" among the decisions of the seven courts of appeal is that awards were vacated in the three cases disapproved by Local 272, and were enforced in the four cases approved by Local 272. But Penn Power submits that no conflict exists among any of these courts regarding the application of the essence test, and Local 272's request for a Writ of Certiorari should therefore be denied.

II. Local 272's Petition Presents No Important Question Of Federal Labor Law.

Local 272 also asserts that its Petition presents an important question of federal labor law. While the question is not explicitly stated, Penn Power assumes that Local 272 refers to the alleged concern that the Court's decisions are "rendered meaningless" as long as the lower courts are permitted "to circumvent the U.S. Supreme Court's mandate by simply opining that the decision 'conflicts with the express provisions of the collective bargaining agreement.'" Pet. at p. 14.[2]

As Penn Power stated in part A of this brief, the standard which troubles Local 272 comes from the Court itself, particularly the quoted statement from *Misco* that an "arbitrator may not ignore the plain language of the contract." 484 U.S. at 38. But the hollow nature of Local 272's concern is shown by a closer look at the quoted language from the recent Sixth Circuit decision in *Appalachian* which was referred to by Local 272. The Sixth Circuit relied upon its own 1982 decision in *Grand Rapids Die Casting Corp. v.*

2. While Local 272 does not cite any authority for this quote, it is from the Sixth Circuit decision in *Appalachian*, 245 F.3d at 604.

Local Union No. 159, U.A.W., 684 F.2d 413 (6th Cir. 1982), as support for its standard of review. *Grand Rapids Die Casting*, in turn, relied upon *Enterprise* in the course of stating that the award at issue would be set aside:

> . . . given the award did not draw its essence from the collective bargaining agreement. Rather, the arbitrator substituted terms and discipline he felt were reasonable for the term of the agreement. As the Supreme Court made clear . . . it is not the function of the arbitrator to decide whether or not he likes the terms of a written collective bargaining agreement.

684 F.2d at 416.

Thus, recent decisions of the Sixth Circuit, like those of the Court of Appeals, do not show any intention to circumvent the Court's standard. As such, Local 272's Petition presents no important question of federal labor law, and the request for a Writ of Certiorari should be denied for this reason as well.

III. The Court Of Appeals Correctly Decided That The Labor Arbitration Award Should Not Be Enforced.

Local 272's final reason for requesting that the Court issue a Writ of Certiorari is that the Court of Appeals erred when it concluded that the arbitrator's decision conflicted with the express provisions of the collective bargaining agreement. In its Petition, Local 272 merely restates the arguments which were rejected by the Court of Appeals in both its initial opinion and upon request for rehearing *en banc*. Pet. at pp. 15-17. Penn Power submits that the Court

of Appeals correctly decided the issue presented by the appeal, and that nothing in its decision warrants review by the Court.

As the Court of Appeals noted, Penn Power sought neither "a judicial review of the merits of the arbitrator's award," nor a reversal based upon the belief "that the arbitrator erred in his interpretation of the Agreement." Pet. App. at 13a. Rather, in line with *Enterprise* and its progeny, including *Misco*, Penn Power argued that when the arbitrator ruled that Penn Power violated the anti-discrimination clause of the collective bargaining agreement by failing to afford voluntary retirement benefits to bargaining unit employees while granting them to supervisory employees, the arbitrator "acted outside the scope of his authority, and failed to draw his decision from the essence of the Agreement." Pet. App. at 14 a. The Court of Appeals went on to find that:

> — "Nothing in the labor contract between the parties provides that production and maintenance employees shall have the same benefits as supervisory employees, particularly voluntary retirement benefits";
>
> — "Nothing in the anti-discrimination provision of the contract between the employer and its union employees remotely provides a basis for a determination that the Company discriminated against its Union employees because it did not offer the same . . . benefits it afforded its supervisors"; and

— "Nothing in the Agreement, including the anti-discrimination provision, requires that supervisors and bargaining unit employees shall have the same wages, vacations, or other benefits on the same basis as supervisors."

Pet. App. at 15a.

The Court of Appeals then stated that the requirement, imposed by the award, that an employer provide similar benefits to bargaining unit employees and supervisory employees "has no basis in reality, law, or industry practice," and "[c]ertainly no such requirement is contained in the Agreement between the Company and the Union." Pet App. at 17a. As such, the Court of Appeals concluded, the arbitrator "exceeded the scope of the arbitration provision and his decision fails to draw its essence from that Agreement." Pet. App. at 18a.

As the Court of Appeals noted in *Ludwig Honold*, 405 F.2d at 1126, the *Enterprise* standard "held a checkrein" on an arbitrator, one which the Court of Appeals correctly applied in the case before the Court. To the extent that Local 272 argues that the Court of Appeals misapplied the facts or drew inappropriate inferences from the record below, the Court should reject the request, since a writ of certiorari is not granted to review the evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220 (1925). To the extent that Local 272 argues that the Court of Appeals misapplied the essence test — set forth in *Enterprise* and translated by the Court of Appeals in cases such as *Ludwig Honold* — the Court should conclude that the decision below is an example of what the Court of Appeals found it to be, which is that of an arbitrator who "strays from interpretation and application

of the agreement and effectively dispense[s] his own brand of industrial justice." *Garvey*, 532 U.S. at 509, *quoting Enterprise*. For either reason, Penn Power submits that the decision below does not warrant review by the Court.

CONCLUSION

For the reasons set forth above, Penn Power respectfully requests that Local 272's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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